

IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON DIVISION II

KITSAP COUNTY, a political
subdivision of the State of Washington,

Respondent,

v.

KITSAP RIFLE AND REVOLVER
CLUB, a not-for-profit corporation
registered in the State of Washington, and
JOHN DOES and JANE DOES I-XX,
inclusive,

Appellant,

and

IN THE MATTER OF NUISANCE AND
UNPERMITTED CONDITIONS
LOCATED AT: One 72-acre parcel
identified by Kitsap County Tax Parcel ID
No. 362501-4-002-1006 with street
address 4900 Seabeck Highway NW,
Bremerton Washington.

Case No.: 43076-2-II

**APPELLANT'S MOTION TO
ENLARGE DEADLINE TO
FILE APPELLANT'S MOTION
FOR RECONSIDERATION**

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I. IDENTITY OF MOVING PARTY

Appellant Kitsap Rifle & Revolver Club (“the Club”).

II. RELIEF REQUESTED

Pursuant to RAP 18.8, the Club respectfully requests that the Court waive the Club’s inadvertent violation of GR 30(c) and allow the filing of *Appellant’s Motion for Reconsideration*, filed on November 17, 2014 at 6:29 PM (the “Motion”).

This motion is supported by the attached *Declaration of Brooks Foster*, dated November 20, 2014 (“Foster Decl.”), with Exhibits 1 through 4.

III. GROUNDS FOR RELIEF

A. Facts Relevant to Motion.

On October 28, 2014, the Court filed its *Published Opinion* (the “Opinion”) in the above-captioned case. Pursuant to RAP 12.4(b), the deadline to file a motion for reconsideration was November 17, 2014. The Club’s counsel, working with his staff, filed the Motion electronically on November 17, 2014 at 6:29 PM. *See* Foster Decl. ¶ 2, Ex. 1 (certificate of filing). The Club’s counsel immediately received an email certificate that confirmed the filing. *Id.* The email was time-stamped 6:30 pm. *Id.*

On November 19, 2014, the Club’s counsel received a letter from the Court Clerk rejecting the Motion on the grounds that it was filed after

5 pm on the due date. *Id.* ¶ 3. This surprised the Club’s counsel, who believed the Motion had been timely filed because the Court had previously accepted filings by the Club as late as 9:43 pm without post-dating them to the next day. *Id.* This had led the Club’s counsel to believe the Court’s e-filing system was “open for business” until at least 10 pm. *Id.* ¶¶ 3, 9.

The Club’s counsel now understands from the Court’s November 19 letter that the Court considers any document e-filed after 5 pm to have been filed the next day. *Id.* ¶ 4. The Club’s counsel was not aware of this when the Motion was filed. *Id.* The motion could have been filed before 5 pm and would have been but for the Club’s counsel’s misapprehension of the Court’s rule regarding e-filing. *Id.*

On at least three earlier occasions in this case, the Club’s counsel e-filed documents with the Court after 5 pm. *Id.* ¶ 5. Each time, the Court immediately delivered an electronic confirmation of filing. On no occasion did the Court inform the Club’s counsel that any of its filings would be post-dated. *Id.* One of the filings was an answer to a motion to strike, which the Court accepted at 9:43 pm on the day it was due. This prior course of dealings led the Club’s counsel to believe the Motion was timely when it was filed at 6:29 pm on November 17, 2014. *Id.*

On February 20, 2014, Respondent Kitsap County filed *Kitsap County's Motion to Strike Portions of Reply Brief*. *Id.* ¶ 6. The Court set a deadline of April 3, 2014, for the Club to answer the motion.¹ On April 3, 2014, at 9:43 pm, the Club's counsel filed *Appellant's Answer to Respondent's Motion to Strike*. The Club's counsel immediately received a filing confirmation email from the Court. *See* Foster Decl. ¶ 6, Ex.2 at 1. The Court issued no follow up communication rejecting the answer or warning the Club's counsel it was untimely. *Id.* The Court considered the answer and denied Kitsap County's motion to strike on April 22, 2014. *Id.*

Similarly, on at least two other occasions the Club's counsel filed documents with the Court after 8 pm. *Id.* at 7. By all appearances, the Court accepted them as having been filed on the day of filing. *Id.* After both filings, the Club's counsel immediately received electronic filing confirmation emails from the Court. *Id.* The Club's counsel was never informed that the filings had to be post-dated or that e-filing after 8 pm would not take effect until the next day. *Id.* The Club's counsel relied on these prior experiences when filing the Motion at 6:29 pm on November 17, 2014.

¹ *See Order Granting Respondent's Mot. to File Over-Length Mot. to Strike Portions of Reply Br., Order Granting Appellan't Mot. to File Over-Length Resp. to Mot. to Strike and Granting Extension of Time to File Resp. to Mot. to Strike* (Mar. 4, 2014).

The Club's counsel worked diligently to prepare the Motion. But for his misapprehension of the Court's e-filing rule, the Club's counsel would have filed the Motion before 5 pm on November 17, 2014. Foster Decl. ¶ 9. The time between 5 pm and 6:29 pm was spent triple-checking the citations and tables in the Motion to ensure their accuracy. *Id.* The Motion could have been fully drafted, checked, and filed before 5 pm—and would have been if the Club's counsel had known the Court's policy on e-filing. *Id.*

Treating the Club's Motion for reconsideration as having been filed on November 17, 2014, will serve the interests of justice. The Motion addresses a legal issue identified by the Court in its Opinion as one that was not addressed by the parties. That issue is whether the repeal of a Kitsap County ordinance after trial should have any effect on the outcome of the case. The Opinion decided not to answer that question on the grounds that a common law rule has the same effect that the repealed ordinance once had. Option at 9–10. The Opinion then instructed the trial court to fashion a remedy on remand for the violation of that common law rule. The Club's Motion asks the Court to reconsider this instruction based on multiple Washington Supreme Court cases that hold no such common law rule exists. The Motion then asks the Court to hold that the repeal of the ordinance means that, on remand, the trial court should not

remedy a prior violation of the ordinance. Foster Decl. ¶10. It is in the interest of justice for the Court of Appeals to reconsider these issues before concluding its review of the case.

B. Legal Analysis.

Washington Rule of Appellate Procedure 18.8 allows the Court to “waive or alter the provisions of these rules and enlarge or shorten the time within which an act must be done in a particular case in order to serve the ends of justice.” RAP 18.8(a). The Court will enlarge the time to file a motion for reconsideration in “extraordinary circumstances” to “prevent gross miscarriage of justice.” RAP 18.8(b). Extraordinary circumstances include instances where a filing was defective due to excusable error. *See Scannell v. State*, 128 Wn.2d 829, 836, 912 P.2d 489 (1996) (reversing appellate court’s denial of motion to extend deadline to file notice of appeal where appellant made an innocent mistake regarding the interpretation of a rule of appellate procedure); *Weeks v. Chief of Washington State Patrol*, 96 Wn. 2d 893, 895-96, 639 P.2d 732, 733 (1982) (affirming appellate court’s granting of motion to extend filing deadline where appellant filed notice of appeal in the appellate court, as opposed to trial court).

Washington courts recognize that court procedural rules are “designed to allow some flexibility in order to avoid harsh results.” *Id.*

This is consistent with the “law in this state to interpret rules and statutes to reach the substance of matters so that it prevails over form.” Courts have been lenient where a party made a “good faith effort” to satisfy the rule at issue, particularly where it had “not been construed previously in any reported decisions.” *Scannell*, 128 Wn.2d at 836–837.

Here, the Club’s counsel inadvertently violated General Rule (GR) 30(c) by electronically filing the Motion at 6:29 pm on the day it was due. GR 30(c) provides: “[a]n electronic document is filed when it is received by the clerk’s designated computer during the clerk’s business hours.” GR 30(c). The Club’s counsel mistakenly believed the clerk’s business hours for e-filing purposes ended no sooner than 10 pm based on his prior filings in this case. Those filings included an answering brief filed at 9:43 pm on its due date that was accepted by the court and treated as timely. Foster Decl. ¶ 6, Ex. 2. On at least two other occasions, the Court accepted and confirmed electronic filings by the Club’s counsel after 8 pm. *Id.* ¶ 7.

Moreover, the text of GR 30(c) is not so crystal clear as to render the Club’s counsel’s mistake inexcusable. Prior to the Court’s November 19, 2014 letter, the Club was never informed that the clerk’s business hours for e-filing end at 5:00 PM. Foster Decl. ¶ 11. The clerk’s business

hours are not listed on the Court's website or e-filing portal.² GR 60(c) and the term "clerk's business hours" are not referenced in any published Washington court decision. Foster Decl. ¶ 11. There are no general orders regarding the clerk's business hours. *Id.*³ The Club's counsel is unaware of any rule of appellate procedure or court document that states the Court's e-filing business hours. *Id.* In federal court and other jurisdictions that allow e-filing, the Club's counsel has been able to electronically file documents up until midnight on their due date. *Id.*

Under the circumstances, the error by the Club's counsel in filing the Motion at 6:29 pm on its due date should be excused. It occurred under extraordinary circumstances, and it would be a gross miscarriage of justice for the Club to lose its right to move for reconsideration on account of that error.

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² The Court's website lists the end of its general hours as 4:00 pm, which is one hour before the 5:00 pm time referenced in the clerk's November 19, 2014 letter. Foster Decl. ¶ 11.

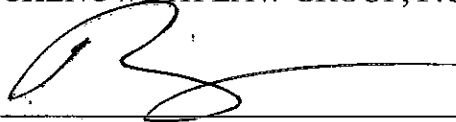
³ CR 30(c) does not identify the close of the clerk's business hours. Some Washington courts have enacted local rules that specifically identify the end of the clerk's business hours. *See* Thurston Superior Court Local Rule 30 ("An electronic document is considered filed with the clerk when it is received by the clerk's designated computer during the clerk's business hours. Any document electronically filed with the clerk by 5:00 p.m. Pacific Time on a business day shall be deemed filed with the clerk on that date").

IV. CONCLUSION

For the reasons stated above, the Club respectfully requests that the Court waive the Club's inadvertent violation of GR 30(c) and allow the filing of *Appellant's Motion for Reconsideration*, filed on November 17, 2014 at 6:29 PM (the "Motion").

DATED: November 20, 2014.

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Of Attorney for Appellant

DECLARATION OF FILING AND SERVICE

I, Lisa A. Heath, declare under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned have been a resident of the State of Oregon, over the age of eighteen years, not a party to or interested in this cause of action, and competent to be a witness herein. On the date stated below, a copy of the *Appellant's Motion to Enlarge Deadline to File Appellant's Motion for Reconsideration* was electronically filed with Division II of the Washington Court of Appeals and served upon the following individuals by e-mail and U.S. Mail, postage prepaid, at Portland, Oregon:

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Jennine Christensen
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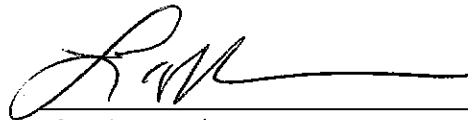
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DATED this 20th day of November, 2014.

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